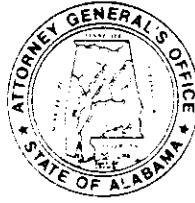


# OFFICE OF THE ATTORNEY GENERAL



94-00003

JIMMY EVANS  
ATTORNEY GENERAL  
STATE OF ALABAMA

OCT 15 1993

ALABAMA STATE HOUSE  
11 SOUTH UNION STREET  
MONTGOMERY, ALABAMA 36130  
AREA (205) 242-7300

Dr. Fred J. Gainous  
Chancellor  
Department of Postsecondary Education  
401 Adams Avenue  
Montgomery, Alabama 36130-2130

State Board of Education -  
Attorneys - Offices and Officers

The State Board of Education members are entitled to legal representation by the State when they are sued individually if they were acting in their official capacities within the line and scope of their duty when the cause of action arose.

Dear Dr. Gainous:

This opinion is issued in response to your request for an opinion from the Attorney General.

## QUESTION

Are members of the State Board of Education afforded legal representation by the State of Alabama when they are sued individually?

## FACTS AND ANALYSIS

Suits against State Board of Education members in their individual capacity aim to hold members personally liable for their actions. See Kentucky v. Graham, 473 U.S. 159, 105 S. Ct. 3099 (1985) (discussing personal capacity 42 U.S.C. § 1983 suits). In general, when board members are sued

individually for damages, they are entitled to attorney representation by the State if the board members' actions that are the basis of the suit occurred while the members were acting in their official capacity. Each suit against board members must be analyzed to determine if the members were acting in an official capacity.

Usually board members act in their official capacity when the Board acts as a body. The Board has authority under the state constitution and laws to act for the State in overseeing public education. The 1901 Alabama Constitution, Amendment 284, vests the general supervision of public schools in Alabama to the Board of Education. Ala. Code § 16-3-11 (1975) gives the Board the authority to exercise general control and supervision over the public schools of the state. Additionally, the Alabama Supreme Court has held that because of the Board's purpose, to control and supervise public schools in the state, offices on the State Board of Education are State offices. (Kirksey v. Democratic Party, 495 So. 2d 638, 639 - 40 (Ala. 1986)) Thus, the State Board of Education, as a body, has the authority to act on behalf of the State on matters of public education, but the individual board members have no power to act individually on behalf of the State. In other words, board members are not authorized to act individually, but only as a Board. The State Board of Education has the authority to act pursuant to its constitutional and legislative powers only when a quorum of its individual members are present at an announced meeting. Ala. Code § 16-3-7 (1975). Consequently, no individual board member may act in an official capacity separately. Official action only occurs when the Board acts in a manner consistent with the state laws granting its authority. See, e.g., Carroll v. Alabama Public Service Commission, 281 Ala. 559, 266 So. 2d 364 (1968) (where the Alabama Supreme Court held that an order issued by the PSC without the PSC meeting as a body was void).

Because the Board can only act as a whole and members cannot take action individually, most cases against the Board will be in the members' official, as opposed to individual, capacity. Often the style of a case will indicate in what capacity the members are being sued. Moreover, the Board members' names will often be listed in the style of the case only as a method of service, not in order to sue them individually.

Indeed, the style of the case is not determinative of how the members are being sued. Rather, the course of the proceedings (Brandon v. Holt, 469 U.S. 464, 469 (1985)) and the type of relief sought will determine the type of liability for the members. If the relief sought can only be applied to the Board as a whole, such as damages sought from the State Treasury (Gamble v. Florida Department of Health and Rehabilitative

Service, 779 F. 2d 1509, 1513 (11th Cir. 1986)) or an injunction of a Board action, then the suit is against the members in their official capacity. Therefore, even if the board members are named individually, if the suit is in essence only against the Board, then the board members have no individual interests in the suit because only the actions of the Board are at issue. In these cases the members will be represented by state representation.

An important issue is the Attorney General's authority to direct and control all litigation concerning the State or any of its departments. § 36-15-21 (Ala. Code 1975). This statutory authority dictates that the Attorney General has the ultimate decision regarding litigation involving a state agency. (Ex parte Weaver, 570 So. 2d 675 (Ala. 1990)) (The Alabama Supreme Court held that the Attorney General could move to dismiss an appeal filed by the Commissioner of Insurance in a case involving the Alabama Insurance Department. The court held that the Attorney General had the power pursuant to § 36-15-21 to settle the case regardless of whether the Governor or the Commissioner of Insurance approved.) Therefore, the Attorney General can decide whether a board member can defend, pursue or appeal a case. Furthermore, Ala. Code § 36-15-21 (1975) requires that only the Attorney General, with the Governor's approval, may hire independent counsel to represent a state agency. Thus, a board member cannot hire independent counsel to represent him or her without the Attorney General's and Governor's approval. Moreover, as discussed earlier, a board member will not need individual counsel when the Board's actions are at issue. The member will be represented by the Board's representation.

Finally, an additional point is State liability coverage. Ala. Code § 36-1-6.1 (1975) provides for a system of liability coverage for employees of State agencies, departments, boards or commissions. The members of the State Board of Education are covered under this fund. Although § 31-1-6.1(e) excludes this law from applying to educational institutions or local boards in the state, this exclusion does not apply to the State Board of Education. To read the exclusion so that it applies to the State Board of Education while all other State agencies received liability coverage would be an unworkable and unjust construction of § 36-1-6.1. The Alabama Supreme Court has held that if a statute has two possible constructions, one of which is workable and fair and the other unworkable and unjust, the court will assume that the legislature intended the workable and fair construction. Ex parte Hayes, 405 So. 2d 366 (Ala. 1981). Therefore, the reasonable interpretation § 36-1-6.1 is that the statute excludes institutions of higher education and local boards of education from liability coverage while not excluding a state board or agency such as the State Board of Education.

Attorney General's Opinion to Dr. Wayne Teague, dated September 6, 1990, A.G. No. 90-00375.


CONCLUSION

Therefore, when a board member is sued individually and was acting in an official capacity within the line and scope of his or her employment, the board member will be afforded legal representation by the State. But the board member will not require individual representation because the Board's actions, not the individual member's, will be at issue.

I hope this sufficiently answers your question. If our office can be of further assistance, please do not hesitate to contact us.

Sincerely,

JIMMY EVANS  
Attorney General  
By:

  
JAMES R. SOLOMON, JR.  
Chief, Opinions Division

JE/jri/ja